IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 892

JAMES MARCHETTI,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner James Marchetti prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Second Circuit entered on October 29, 1965.

Opinions Below

The opinion of the Court of Appeals, as yet unreported, is printed in the Joint Appendix to this petition (Jt.App. 1a).[1] The opinions in *U. S. A.* v. *Piccioli,* Docket No. 29521

[1] References are indicated as follows:

References to the numbered pages of the Joint Appendix to Petitions for Petitioners Marchetti and Costello (Jt.App. a).

References to the numbered pages of the Proceedings in United States Court of Appeals Second Circuit (Pro.Ct.App.).

References to the numbered pages of the Appendix to Briefs for Appellants Marchetti and Costello in the Court of Appeals (App. Ct.App. a).

References to the numbered pages of the Record on Appeal (R.).

in the Court of Appeals, and *U. S. A.* v. *Grassia,* Docket No. 29791 in the Court of Appeals, related cases, are also printed in the Joint Appendix (Jt.App. 16a-29a).

Jurisdiction

The judgments of the Court of Appeals were entered on October 29, 1965. Petitioner's petition for rehearing was denied on November 26, 1965 (Pro.Ct.App. 123). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Should *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax laws here involved, be reconsidered by this Court in the light of recent decisions?

2. Assuming, *arguendo,* the continued validity of cases upholding the constitutionality of the wagering tax laws, were the statutes applied and enforced against petitioner in an unconstitutional manner or so as to violate the proper standards for the enforcement of federal criminal law under this Court's supervisory powers?

3. Did the use, without proper objection at trial, of petitioner's self-incriminatory oral and written post-indictment statements deliberately elicited from him without warning as to his right to counsel vitiate petitioner's convictions?

Constitutional and Statutory Provisions Involved

Petitioner maintains that the judgments of the court below, affirming his convictions for violations of the wagering tax laws and the federal conspiracy statute, violate his rights under the Fifth, Sixth and Tenth Amendments of the United States Constitution. The wagering tax laws, 26 U.S.C. §§ 4401, 4411 and 4412, and the constitutional provisions involved, together with general revenue laws relating to these cases, are set forth in the Joint Appendix to this petition (Jt.App. 29a).

Statement

Petitioner faces a one-year prison sentence and a $10,000 fine for convictions by a jury presided over by Chief Judge Timbers of the United States District Court for the District of Connecticut upon two indictments charging willful violations of the wagering tax statutes and the federal conspiracy statute (Jt.App. 3a).[2] His convictions stem from a raid on October 8, 1964, in Bridgeport, Connecticut, in which co-defendants Costello and Gjanci (Jt.App. 3a) and

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[2] In the initial action, Criminal No. 11267 in the District Court petitioner and co-defendants Costello and Gjanci were charged with conspiring to wilfully fail to pay, in violation of 26 U.S.C. § 7203 (Jt.App. 31a), the special occupational tax imposed by 26 U.S.C. § 4411 (Jt.App. 30a) upon persons engaged in the business of accepting wagers and receiving wagers for others.

In the second action, Criminal No. 11270 in the District Court petitioner was charged in two counts with violating 26 U.S.C. § 7203 in failing to pay the special occupational tax required by 26 U.S.C. § 4411 and in failing to register as required by 26 U.S.C. § 4412 (Jt.App. 30a). Co-defendants Costello and Gjanci were also charged in separate indictments, each containing two counts, with the same substantive violations.

35 other defendants (App.Ct.App. 18a) were arrested on similar charges (Jt.App. 3a).

The indictments against petitioner and the others were returned under seal by a grand jury of the District of Connecticut on October 6, 1964, two days before the raid and arrests (Jt.App. 7a; App.Ct.App. 1a, 16a, 123a, 133a); they remained impounded until October 8 at 2:36 P.M. (Jt.App. 7a; App.Ct.App. 18a). Prior to the unsealing of the indictments, the Government distributed a press release (Jt.App. 7a) terming the arrests "a spectacular thrust at the exyensive (sic) gambling activities in" the Bridgeport area, in which "75 special agents of the Intelligence Division, with the aid of 50 State Policemen, swooped down on some 40 establishments." (Jt.App. 7a; App.Ct.App. 70a). The prepared press release mentioned petitioner's name, the amount of bond, the criminal charges and evidential matter relating to the non-existence of wagering tax stamp (Jt.App. 7a; App.Ct.App. 70a), even though two days before, when the indictments were impounded, the District Court had specifically warned:

> " . . . there must be no disclosure by anyone as to the identity of those named in the indictment, or even of the fact that such proceedings have taken place by you ladies and gentlemen." (App.Ct.App. 204a).

As the court below summarized, following distribution of the news release:

> "The Government took the newsmen to the I.R.S. headquarters where the latter were able to photograph those who had been arrested as they were brought into custody. There was extensive newspaper, radio and

> television coverage on October 8 in Bridgeport and elsewhere in Connecticut. On the two following days, the Bridgeport press reported oral statements by Chief Asst. U. S. Attorney Owens to the effect that the government had 'broken the back of gambling' in Bridgeport, that the funds from gambling were supporting prostitution, that housewives had called to express gratitude at the prospective curtailment of their husbands' aleatory propensities, and that Costello and Marchetti had previous convictions for income tax violation." (Jt.App. 8a).

The court below noted that petitioner made no motion directed to this specific publicity prior to the selection of the jury (Jt.App. 8a). However, petitioner did seek a mistrial and a change of venue on the first day of trial. While the jury in the instant action was excused pending selection of other juries in related cases, *The Bridgeport Post* of December 1, 1964 reported that "six more suspected gamblers arrested by federal agents last October today submitted guilty pleas" and that an assistant U. S. Attorney expected others to change their pleas to guilty (Jt.App. 9a). Before the presentation of evidence on December 2, the first day of actual trial, petitioner moved for a mistrial (App.Ct. App. 5a, 207a) and a change of venue (App.Ct. App. 211a), referring to both the earlier publicity at the time of the raid[3] *and* the December 1 article. Both motions were denied by the trial court (App.Ct.App. 5a, 125a, 207-217a).

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[3] In seeking a mistrial, counsel referred to "motions that were made in previous cases" (App.Ct.App. 207a)—a reference to *United States* v. *Grassia* (Jt.App. 33a) which clearly indicates both episodes of publicity were being jointly urged as a basis for relief.

At trial the Government's principal evidence against petitioner was (1) the testimony of the undercover agent Ripa and (2) post-indictment, self-incriminatory statements (Govt.Ex. 7; App.Ct.App. 143a) deliberately elicited from petitioner by arresting officers when he had neither waived his right to counsel nor been warned of his constitutional right to consult counsel (Jt.App. 14a).

After the jury returned guilty verdicts against petitioner and the other defendants in all four cases (App.Ct.App. 9a, 52a, 129a, 140a), petitioner filed two post-trial motions: one sought an acquittal or new trial (App.Ct.App. 57a); the other a dismissal of the indictment (App.Ct.App. 59a) because of the conscious and deliberate generation of publicity by the Government and because of the unconstitutionality of the wagering tax statutes (App.Ct.App. 57a-89a). Both motions were denied (App.Ct.App. 11a, 130a).[4]

Immediately after the denial of these motions on January 11, 1965, and before imposing sentence upon petitioner and others (App. Ct.App. 11a-12a, 130a), Chief District Judge Timbers commented extensively about the evils of gambling, narcotics, and prostitution and the lack of State of Connecticut gambling law enforcement (App.Ct.App. 344a-346a). Of the revenue laws here involved, he stated:

> ". . . it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling" (App.Ct.App. 344a).

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[4] Both motions appeared on the motion calendar of January 11, 1965 (App.Ct.App. 54a). The trial court allowed argument and then denied the motion for acquittal (App.Ct.App. 12a, 130a). On the motion to dismiss the indictments based on matters which can be raised at any time the court refused even to hear counsel, stating "you run the risk, if you are going to proceed further, of consequences" (App.Ct.App. 342a).

On January 11, 1965, in accordance with Chief Judge Timbers' order conditioning bail upon the filing of a notice of appeal within 24 hours, petitioner appealed to the Court of Appeals for the Second Circuit (App.Ct.App. 11a, 130a), which affirmed the judgments (Jt.App. 2a) and later denied rehearing (Pro.Ct.App. 123).

Relying on *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), the Court of Appeals rejected petitioner's constitutional attack upon the wagering tax statutes and the manner of their application here, declaring as to the self-incrimination clause argument:

> "[W]e find no subsequent opinion [to *Kahriger* and *Lewis*] reflecting on the authority or reasoning of these cases and, at least under such circumstances, it is no proper function of ours to speculate on whether the dissent of yesterday may become the decision of tomorrow." (Jt.App. 6a).

On reargument the court noted by reference (Pro.Ct.App. 121) to the related case of *United States* v. *Grassia*:

> "Recognizing that the rationale of *Albertson* v. *Subversive Activities Control Board,* —— U.S. —— (1965), announced subsequent to our Costello opinion, may lead the Supreme Court to overrule its previous decisions in *United States* v. *Kahriger,* 345 U.S. 22 (1953), and *Lewis* v. *United States,* 348 U.S. 419 (1955), insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination, we consider that issue more appropriate for that Court's determination." (Jt.App. 26a).

In regard to the claim of undue publicity, the Court of Appeals recognized that the earlier publicity at the time of the raid "was improper by any standard and might well be a basis for reversal if appellants had moved for a change of venue or a continuance" (Jt.App. 8a). The court found that the December 1 episode was properly raised, but not significant on its merits (Jt.App. 9a-10a). In treating the earlier raid publicity and the December 1 article as completely unrelated episodes, the Court of Appeals made no reference to petitioner's motion for a change of venue (App.Ct.App. 211a) or the fact that defense counsel referred to the "motions that were made in previous cases." (Jt.App. 34a).

With respect to the self-incriminatory, post-indictment statements elicited from petitioner by federal officers in the absence of counsel, the court below equated petitioner's Sixth Amendment argument to a *McNabb-Mallory* contention and held, on the basis of *United States* v. *Indiviglio*, —— F.2d —— (2 Cir. 1965), that petitioner's failure to object at trial to the admissibility of the statements was fatal to his claim (Jt.App. 15a).

As noted, the court below denied petitioner's petition for rehearing on November 26, 1965. It did, however, stay the issuance of its mandate to permit the filing of this petition for certiorari (Pro.Ct.App. 118).

Reasons for Granting the Writ

This petition presents significant and fundamental issues relating to the wagering tax statutes and their application in the District of Connecticut. Review of the questions presented is called for (1) because this Court's decisions in

United States v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), upholding the constitutionality of the wagering tax statutes, are in conflict with later decisions of this Court; (2) because the court below has sanctioned the conscious generation of publicity by the Government and statements by the district judge which sufficiently depart from the proper administration of federal criminal justice to call for an exercise of this Court's power of supervision and (3) because there exists a conflict among several of the courts of appeal relating to the need for objection at trial to the use of post-indictment, unconstitutionally-obtained, self-incriminatory statements.

I.

> "Are you engaged in the business of accepting wagers on your own account?"
>
> "Do you receive wagers for or on behalf of some other person or persons?" (App.Ct.App. 73a).

It is for his failure to answer these and more detailed inquiries contained in Internal Revenue Form 11-C (App. Ct.App. 73a) that petitioner has been subjected to a one year prison sentence and a $10,000.00 fine (Jt.App. 3a). As Mr. Justice Black commented in a dissent a decade ago, if a compelled response to these questions

> ". . . would not violate the Fifth Amendment privilege against self-incrimination, it is hard to think of anything that would." *Lewis* v. *United States*, *supra*, 348 U.S. at 425.

In rejecting petitioner's contention that the self-incrimination clause of the Fifth Amendment protected petitioner,

in the wagering tax context, from having to make any statements save those that "cannot possibly have such tendency to incriminate," *Malloy* v. *Hogan,* 378 U.S. 1, 12 (1964), the court below relied squarely upon *Kahriger* and *Lewis.* While noting, by reference, in its opinion on rehearing that *Albertson* v. *Subversive Activities Control Board, supra,* may lead this Court to overrule *Kahriger* and *Lewis* "insofar as these sustained the federal wagering statutes against attack on the ground of self-incrimination," the court felt that the issue was appropriate only for this Court's determination (Jt.App. 26a).

What petitioner urges is a reappraisal of *Kahriger* and *Lewis* in the light of *Malloy* and *Albertson.*

Significantly, *Kahriger* and *Lewis* were decided without mention of the doctrine this Court firmly established in *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951): that the privilege against self-incrimination "not only extends to answers that would in themselves support a conviction . . . , but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute . . . ," and without reference to the specific information sought by the Internal Revenue Service form involved here (App.Ct.App. 73a). *Malloy* reemphasized the link-in-the-chain principle ignored in *Kahriger* and *Lewis; Albertson* emphasized the questions on the Justice Department registration form, the I.R.S. counterpart of which is involved here and had been ignored in *Kahriger* and *Lewis.*

In *Kahriger* and *Lewis,* the wagering tax statutes were upheld because the Court felt they operated only prospectively and were, therefore, non-compulsory. 345 U.S. at 32, 33; 348 U.S. at 422. But by similar reasoning the

Albertson registration provisions would have been held valid, since individual Communist Party members could terminate their membership within 30 days after entry of a § 786(a) order directed to the Party, 34 U.S.L. Week at 4014, and thus avoid individual registration. Yet this Court invalidated the registration provisions in *Albertson;* and its comments in so doing are equally applicable to the wagering tax statutes and undermine the rationale of *Kahriger* and *Lewis*:

> "The risks of incrimination which the petitioners take in registering are obvious. Form IS-52a requires an admission of membership in the Communist Party. Such an admission of membership may be used to prosecute the registrant under the membership clause of the Smith Act . . . or under § 4(a) of the Subversive Activities Control Act . . ., to mention only two federal criminal statutes. . . . *Patricia Blau* v. *United States,* 340 U.S. 159; *Irving Blau* v. *United States,* 340 U.S. 332; *Brunner* v. *United States,* 343 U.S. 918; [and] *Quinn* v. *United States,* 349 U.S. 195 . . . involved questions to witnesses on the witness stand, but if the admission cannot be compelled in oral testimony, we do not see how compulsion in writing makes a difference for constitutional purposes. . . . It follows that the requirement to accomplish registration by completing and filing Form IS-52a is inconsistent with the protection of the Self-Incrimination Clause." *Albertson* v. *S.A.C.B., supra,* 34 U.S.L. Week at 4016.

Here, too, the risks of incrimination are obvious. For petitioner to pay the tax required by 26 U.S.C. § 4411 (Jt.App. 30a), thereby admitting that he was engaged in

wagering, he would also be required, by 26 U.S.C. §§ 4412 and 6011 (Jt.App. 30a-31a), to furnish on I.R.S. Form 11-C the name and address "where each such business is conducted" and the "name and address" of each employee engaged in receiving wagers (App.Ct.App. 73a).[5]

Disclosure in response to these questions, if not an outright admission of violations of some or all of Connecticut's anti-wagering laws, §§ 53-271 to 53-279, 53-295 to 53-297 (Conn. Gen. Stat., 1958 Rev.) or its criminal conspiracy statute, § 54-197 (Conn. Gen. Stat., 1958 Rev.),[6] would constitute at the very least a "link in a chain of evidence sufficient to connect" petitioner with such violations. 378 U.S. at 13.

Certainly the listing of employees and agents is tantamount to an admission that there has been an agreement with these persons to be employees or agents in the busi-

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[5] These questions and the more detailed inquiries are contained on I.R.S. Form 11-C which is *both* a special tax return and application for registry, which petitioner would have had to complete in order to pay the special tax prescribed by § 4411 and avoid conviction. By virtue of 26 U.S.C. § 6011(a):

> "... Every person required to make a return or statement shall include therein the information required by such forms or regulations."

The Commissioner of Internal Revenue refuses to accept receipt of the $50 for the stamp without the information required by Form 11-C. The fact that a defendant tenders payment which is refused is no defense to a subsequent prosecution for accepting wagers without payment of the $50 special tax. *United States* v. *Mungioli*, 233 F.2d 204, 205 (3 Cir. 1956).

[6] In *Acklen* v. *State of Tennessee*, 267 S.W.2d 101 (Tenn. 1954), for example, the defendant was convicted of conspiracy to violate a state gambling statute solely on the evidence that he had purchased a tax stamp.

ness of wagering.[7] And disclosure of the place of business in which wagering is carried on could lead authorities to a lease, purchase of real estate, or other rental agreement for the purpose of showing overt acts in furtherance of the conspiracy. *State* v. *McLaughlin,* 132 Conn. 325, 340, 44 A.2d 116, 123 (1945). The overt acts, of course, need not be successful toward accomplishing the object of the conspiracy, *State* v. *Devine,* 149 Conn. 640, 649, 183 A.2d 612, 616 (1962), and need not be criminal acts in themselves. *United States* v. *Rabinowich,* 238 U.S. 78, 86 (1915).

If response to the questions asked in *Malloy,* 378 U.S. at 13-14, involved the *possibility* of self-incrimination, compelled compliance with the statutes here involved would make self-incrimination under Connecticut law a practical *certainty.*

To leave *Kahriger* and *Lewis* standing in view of the nature of the self-incriminatory responses called for by the statutory scheme involved in the wagering tax laws is to leave clouded with doubt the proud assertion that the Fifth Amendment privilege reflects our "most noble aspirations." *Murphy* v. *Waterfront Commission of New York,* 378 U.S. 52, 55 (1964).

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[7] 26 C.F.R. § 44.4412-1(b)(2) requires a person engaging or about to engage in the business of receiving wagers to submit the name of any "employee" or "agent" hired to receive wagers *within 10 days after that* "employee" is so engaged. The "employer," then, is forced to supply the name of someone who will admittedly be in a unique position to bear witness against him. And due to the 10 day delay permitted in the registration of such "employees," the information supplied would relate not only to future criminal act, but also to *past* criminal acts.

II.

Not only do the wagering tax statutes here involved violate the Fifth Amendment, but the manner of their application violates the Tenth Amendment and, at the very least, the proper standards for the enforcement of federal criminal law.

Since *Kahriger*—which rejected Mr. Justice Frankfurter's view that the revenue aspect of the wagering tax statutes constituted merely "verbal cellophane" allowing Congress to "control conduct which the Constitution left to the responsibility of the states," 345 U.S. at 38—this Court has made it clear that no weight can be given to the premise that the enactment of the statutes was "in part motivated by a congressional desire to end wagering." *United States* v. *Calamaro*, 354 U.S. 351, 358 (1957). Consideration of such collateral motives, this Court added in *Calamaro*, "might place the constitutionality of the statute in doubt." 354 U.S. at 358. Significantly, in affirming over Tenth Amendment objections, the court below ignored *Calamaro* (Jt.App. 1a-15a).

In *Kahriger*, the Court considered only the bare words and history of the statutes themselves. In the case at bar, the manner of application and enforcement of the statutes —both by the Government and the district court—clearly demonstrates that the "constitutionality . . . doubt" feared in *Calamaro* has materialized.[8]

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[8] It is fundamental that the application and enforcement of a federal statute—constitutionally sound on its face—may result in a constitutional denial. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 373-4 (1886); *Snowden* v. *Hughes*, 321 U.S. 1 (1944).

The Government's sensational comments—such as "we have definitely broken the back of gambling in the City" (App.Ct.App. 79a)—demonstrate that the revenue statutes were being enforced in a manner unrelated to the collection of a tax (App.Ct.App. 78a-82a, 145a-160a). The trial judge's sentencing remarks compound the Tenth Amendment evil:

> "While it is true that these are tax cases, prosecutions authorized by the revenue laws of the United States, it is also a fact, with respect to which the Court is not blind, that *it is the clear intent of Congress, in authorizing such prosecutions, to deal with a vice, namely that of gambling.*" (App.Ct.App. 345a) (Emphasis added.)

Even if the combined conduct of Government and court is not interpreted as a Tenth Amendment encroachment, a reversal is called for on the basis of this Court's exercise of its "supervisory power to formulate and apply proper standards for the enforcement of the criminal law." *Marshall* v. *United States*, 360 U.S. 310, 313 (1959).

Significantly, this case does not involve the delicate problem which arises from diligent or over-diligent reporting by a free press.[9] Rather it involves the conscious and deliberate actions of the Government, including manipulation of the unsealing of the indictments in violation of Rule 6(e), to publicize both inflammatory, non-evidentiary material

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[9] To be sure, the responsibility for freedom of the press and the safeguards of the fair administration of justice—both indispensable elements of our constitutional existence—"present," as Mr. Justice Frankfurter noted, "some of the most difficult and delicate problems for adjudication." *Maryland* v. *Baltimore Radio Show*, 338 U.S. 912, 919 (1950). Because of the active Government role here, however, the Court need not concern itself with such a delicate problem.

and evidentiary material. To effectuate its policy the Government:

1. Prepared prior to the raid on October 8, 1964, and later issued, a press release containing a highly connotative description of the manner in which the federal agents "swooped down" upon petitioner and others (App.Ct.App. 70a). The release mentioned petitioner by name and referred to the amount of his bond (App.Ct.App. 71a).

2. Summoned newsmen, prior to the raid of October 8, 1964, to a private law office in Bridgeport (App.Ct.App. 78a, 155a) where they were briefed and from which they were taken to the office of the Internal Revenue Service, enabling them to photograph defendants as they were brought to a United States Commissioner for arraignment (App.Ct.App. 149a, 151a, 155a).

3. Disclosed to the press, on October 8, 1964, the existence of petitioner's prior criminal record (App.Ct.App. 80a, 153a).

4. Released to the press, on October 8, 1964, and a few days thereafter, highly prejudicial and inflammatory statements, including for example, the following:

> "[An assistant U.S. Attorney] today said funds from the gambling operation were supporting 'prostitution and shylocking.'" *The Bridgeport Post*, Oct. 9, 1964, p. 1 (App.Ct.App. 80a, 153a).
>
> "'Thank God, you finally broke it up—my husband's gambling has ruined our home.'
>
> "This remark was one of more than a dozen emotional expressions of gratitude voiced by housewives who

contacted Howard T. Owens, Jr., chief assistant U.S. Attorney in the wake of the gambling raids by Treasury Agents and State police on Thursday.

"'Some of the women even cried as they told me how gambling by their husband had caused them continuous hardship' Mr. Owens said." *The Bridgeport Post*, Oct. 10, 1964, p. 1 (App.Ct.App. 157a).

5. Released to the press on October 8, 1964, news of the existence of evidence concerning gambling and the fact that defendants did not possess an occupational tax stamp (App.Ct.App. 72a).

Government conduct resulted in massive publicity which saturated the entire State of Connecticut and surrounding areas (App.Ct.App. 77a-78a, 145a-160a).

To avoid the impact of this conscious generation of publicity—which the court considered "needless intensification" and "improper by any standards" (Jt.App. 8a, 27a)—the court below isolated the pre-trial publicity from the December 1 article (Jt.App. 8a-9a). As to the pre-trial publicity, the court held that petitioner's original, *sub silentio* consent to be tried in Bridgeport negated the effect of the publicity (Jt.App. 8a); as to the later episode, the court held that this was not "seriously prejudicial" (Jt.App. 9a). By treating the episodes of publicity separately, the court concluded that the attack on the earlier publicity

"... was too late; counsel could not speculate on a favorable verdict and then claim lack of 'an impartial jury' when the gamble failed." (Jt.App. 9a)

This approach of isolating the episodes of publicity completely ignored the nature of petitioner's motions for mis-

trial and change of venue (App.Ct.App. 207a-211a). At the time of the motion for mistrial on December 2, 1964, there was a specific reference (App.Ct.App. 207a) to the motions made in related cases on November 17, 1964 (Jt.App. 33a). Certainly, petitioner's motions for mistrial and change of venue before the trial actually started (App.Ct.App. 207a-211a), made in the wake of the related cases, dispute the court's assertion that petitioner intended to "speculate on a favorable verdict."

Considering the publicity as a whole, its means of creation, and its "subliminal stimulation" impact on a jury (App.Ct.App. 83a); Manes, *Irvin* v. *Dowd*: *Retreat From Reality*, 22 LAW IN TRANSITION 46, 58 (1962), there is no need to speculate on the effect of any court instructions. While, the trial court's comments were hardly adequate to ascertain the jurors' true feelings (Jt.App. 9a; App.Ct.App. 204a, 216a), petitioner's contention does not rest on that fact. Rather petitioner urges that when the publicity is the Government's doing, reversal is called for under this Court's supervisory power "without pausing to examine a particularized transcript of the voir dire." *Rideau* v. *Louisiana*, 373 U.S. 723, 727, 729 (1963).

The court below recognized that the Connecticut Chief Judge's January 11, 1965 sentencing remarks (App.Ct.App. 345a) were "ill-advised" (Jt.App. 21a) and that his extensive February 8, 1965 remarks (App.Ct.App. 176a-186a) were "even more ill-advised" (Jt.App. 28a), but failed to review this conduct under its supervisory power. The Connecticut Chief Judge's public urgings to "eradicate this . . . cancer of organized gambling . . . now" (App.Ct.App. 185a)—statements the court below felt where "in the prose-

cutorial area beyond his [the trial judge's] control" (Jt. App. 23a)—indicate, as Judge Learned Hand once wrote, that the:

> "... judge was exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials." *United States* v. *Marzano,* 149 F.2d 923, 926 (2 Cir. 1945).

That the statements were post trial certainly does not eliminate the need for exercise of this Court's supervisory power. As the Supreme Court of Rhode Island said in a similar situation:

> "The import of these remarks . . . made immediately after the conclusion of the trial with a verdict of guilty discloses a prejudicial state of mind on the part of the judge that reasonably must be considered to have existed during the trial." *State* v. *Nunes,* 205 A.2d 24, 27 (R.I. 1964).

III.

After petitioner's arrest at 1:15 P.M. he was detained and interrogated by federal agents in the absence of counsel until 5:15 P.M. (App.Ct.App. 271a, 288a). During this four hour period self-incriminatory written and oral statements were deliberately elicited from him by federal agents (Govt.Ex. 7; App.Ct.App. 143a) without any warning as to his right to counsel (Jt.App. 14a). The statements indicating petitioner accepted wagers and did not possess an occupational tax stamp (App.Ct.App. 143a) were used at the trial on the Government's case-in-chief, without proper objection.

Although a violation of petitioner's fundamental rights is apparent on the face of the record here, the Court of Appeals after first equating petitioner's *Massiah-Escobedo* claim to a Rule 5(a), *McNabb-Mallory* objection, held that neither need be considered because they were "not clearly made at trial" (Jt.App. 15a), citing its *en banc* decision in *United States* v. *Indiviglio,* —— F.2d —— (2 Cir. 1965).

In this ruling the lower court's interpretation and application of *Massiah* and *Escobedo* conflicts with the decision of the Court of Appeals for the Fifth Circuit in *Lee* v. *United States,* 322 F.2d 770 (5 Cir. 1963), with a decision of a different panel of the court below in *U.S. ex rel. Stovall* v. *Denno,* —— F.2d —— (2 Cir. 1965, rehearing granted), and with the decision of this Court in *White* v. *Maryland,* 373 U.S. 59 (1959).

In *Lee,* a federal conviction was reversed because of the introduction at trial of oral admissions of defendant obtained during his interrogation by police after indictment and in the absence of counsel, even though *no proper objection* was made at the trial. As the *Lee* dissent noted, the decision was predicated "on a theory of reversible error, not claimed below but put forward for the first time by the majority. . . ." 322 F.2d at 779.

In *Stovall,* the trial court's order denying a petition for a writ of habeas corpus was reversed on the ground that there was admitted at trial evidence obtained in violation of petitioner's right to counsel and privilege against self-incrimination, *notwithstanding his failure to object* to the admission of such evidence.

In *White,* a state court conviction was reversed by this Court without stopping "to determine whether prejudice

resulted," even though it specifically found a *failure to object* to the admission at trial of evidence obtained in derogation of his right to counsel. 373 U.S. at 60.

To be sure, *Stovall* and *White* were capital cases; but this Court has steadfastly rejected all attempts to distinguish between constitutional rights in capital and noncapital cases. *Glasser* v. *United States,* 315 U.S. 60, 76 (1942); *Gideon* v. *Wainwright,* 372 U.S. 335 (1963). As Mr. Justice Clark explained in his concurring opinion in *Gideon*:

> " . . . [T]he Constitution makes no distinction between capital and noncapital cases." 372 U.S. at 348-9.

The ruling of the court below, if undisturbed by this Court, will leave operative a doctrine of waiver by silence or inference which is incompatible with the doctrine of this Court that courts indulge every reasonable presumption *against* waiver of fundamental constitutional rights. *Carnley* v. *Cochran,* 369 U.S. 506, 514 (1962); *Henry* v. *Mississippi,* 379 U.S. 443 (1965). And in the present record, unlike the situation in *Henry,* there is *no* evidence that petitioner even knew of, let alone waived, the constitutional rights relied upon now.

Review here, then, is called for so this Court can affirm that the right to counsel, long vigorously applied at other critical stages of federal criminal proceedings, cannot be diluted at the critical stage most recently recognized in *Massiah* v. *United States,* 377 U.S. 201 (1964)—post-indictment interrogation by arresting officers.

Conclusion

For these reasons, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgments of the court below.

Respectfully submitted,

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